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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Damian Hart, et al., , Plaintiff, vs. Maricopa County Sheriff's Office, et al., Defendants.	No. CV 77-479-PHX-EHC (MS) **ORDER**

The following motions are now pending before the Court:

1. Defendants' "Pre-hearing Memorandum and Renewed Motion for Order to Terminate the Amended Judgment" (Doc. # 906);
2. Plaintiff's "Order for Appointment of Experts" (Doc. # 930);
3. Plaintiff's "Motion for Partial Judgment" (Doc. # 946);
4. Defendants' "Motion to Compel Compliance with the Court's 1/21/04 Order and to Require Specification of All Alleged Current and Ongoing Constitutional Violations (if any) in the Maricopa County Jails" (Doc. # 950);
5. Plaintiff's "Motion Pursuant to Fed. R. Civ. P. 37(a)(2)(B) to Compel Defendants to Allow Expert Inspection" (Doc. # 958);
6. Plaintiff's "Motion to Exclude 'Supplemental Evidence' Submitted by Defendants" (Doc. # 969);
7. Plaintiff's "Motion for Protective Order" (Doc. # 981-1);
8. Plaintiff's "Motion to Quash Deposition Subpoenas" (Doc. # 981-2);

9. Plaintiff's "Motion Pursuant to Fed. R. Civ. P. 37 (a)(2)(B) to Compel Defendants to Produce Relevant Documents" (Doc. # 989);

10. Defendants' "Motion to Entry of Scheduling Order" (Doc. # 998);

11. Plaintiff's "Motion to Exceed Page Limit on Reply Brief [to Motion to Compel at Doc. # 989]" (Doc. # 1003);

12. Plaintiff's "Motion for Order Requiring Defendants to Allow Class Counsel Access to Class Members" (Doc. # 1019);

13. Plaintiff's "Motion for Leave to File Declarations of Class Members and Former Class Members" (Doc. # 1026);

14. Defendants' "Motion for Leave to File Supplemental Response to Address Certain Matters First Raised in Plaintiff's Reply [re: Motion to Allow Counsel Access to Class Members]" (Doc. # 1027); and,

15. Plaintiff's "Motion for Order Requiring Defendants to Allow Class Counsel Access to Class Members" (Doc. # 1093).

The Court will address each motion in turn.

I. PROCEDURAL BACKGROUND

The Court will explain the procedural history of this case to the extent that reiteration is necessary to resolve the instant motions.

An Amended Judgment was entered in this case on January 10, 1995. [Doc. # 705]. The Amended Judgment "imposes extensive obligations on the county," including "ongoing compliance, monitoring and reporting," and enforcement mechanisms, relating to many facets of jail operations for pretrial detainees.[1] However, it is clear from the Amended Judgment that "[t]he provisions, conditions and procedures contained [therein] have been negotiated by the parties and do not represent a judicial determination of any constitutionally-mandated standard applicable to the jails." [Doc. # 75 at 2, ¶ 2]. On April 8, 1998, Defendants filed a Motion to Terminate the Amended Judgment pursuant to the Prison Litigation Reform Act's ("PLRA") termination provisions contained in 18 U.S.C. § 3626. [Doc. # 755]. The Court denied Defendants' motion on September 10, 1998. [Doc. # 774].

[1] Hart v. Arpaio, 2001 U.S. App. LEXIS 1771 at * 2 (9th Cir. Jan. 23, 2001) (unpublished).

Defendants filed an appeal (Doc. # 777), and the Ninth Circuit Court of Appeals reversed and remanded to the this Court for further consideration pursuant to Gilmore v. California, 220 F.3d 987 (2000), a decision that issued only after the Motion to Terminate was denied in District Court.

At an October 29, 2001 hearing (set to address Plaintiffs' motion to conduct discovery), the Court ordered Defendants to submit a memorandum addressing those aspects of the Maricopa County jail operations that potentially raise constitutional concerns covered by the Amended Judgment, and with respect to these areas, whether the County is operating the jails in a way that maintains the rights of pretrial detainees. [Doc. # 831].

A. Defendants' 2001 Memorandum

Defendants submitted their Memorandum on November 28, 2001 ("2001 Memorandum"). [Doc. # 832]. The 2001 Memorandum addressed the following areas: (1) population, housing and multiple bunking; (2) living conditions and medical care (including ventilation, lighting, noise control, temperature, sanitation, food and general living conditions); privileges (including access to reading materials, religious services, mail, telephone, visitation and television); (3) and access to legal materials.

Plaintiffs responded to the 2001 Memorandum. [Doc. # 833 ("Response")]. In their Response at footnote 1, Plaintiffs stated that they "agree that the Defendants have properly identified the subject areas of the Amended Judgment that implicate constitutional concern. In fact, the Defendants have grouped many Amended Judgment subjects in the four categories and have, therefore, covered almost everything that has been dealt with in the Amended Judgment." [Id. at 2]. Plaintiffs explicitly referenced in the Response the issue of adequate shelter, including plumbing, washing facilities, hygiene and clean clothes and bedding, but note that without discovery, they cannot confirm whether Defendants are complying with the policy directives cited by Bill Williams in the Memorandum. [Id. at 5-6]. Plaintiffs did not reference outdoor exercise specifically in their Response, however. Plaintiffs

conclude their Response by requesting an evidentiary hearing regarding housing/overcrowding issues, and discovery as to the remaining issues. In their Reply, Defendants contended that an evidentiary hearing is not necessary, and that the Court should not authorize any discovery. [Doc. # 834].

In its September 12, 2002 Order, the Court recognized that "Plaintiffs agree that Defendants have properly identified the subject areas of the Amended Judgment that implicate constitutional concern." [Doc. # 840]. The Court allowed Plaintiffs to conduct limited discovery, including the depositions of Bill Williams, Trina Lambert, and an employee at the Sheriff's Office who may have information similar to that possessed by Trina Lambert. [Id. at 4]. The Court also required Plaintiffs to submit, by November 1, 2002, a report indicating whether they seek further discovery and their position regarding termination of the Amended Judgment. [Id.].

B. Plaintiffs' 2002 Report

Plaintiffs filed their Report on November 1, 2002 ("2002 Report"). [Doc. # 852]. Plaintiffs specifically addressed overcrowding, psychological and medical care, living conditions (padlocks on cells, physical violence toward inmates, punishment without a hearing, access to legal materials, courts and counsel, and telephone and visitation privileges). Plaintiffs did not directly address plumbing issues or outdoor recreation in their Report. In the Report's conclusion, Plaintiffs requested to review the grievances reviewed by Bill Williams, gain access to six months of recorded phone calls, and access to the Madison Jail to inspect the cells that are padlocked. [Id. at 16-17]. Plaintiffs reserved the right supplement the Report once their review was completed. [Id. at 16].

The 2002 Report's conclusion also contains, in detail, the issues for which Plaintiffs believed a hearing was necessary:

1. Population, housing, multiple bunking (overcrowding);

2. Medical care (staffing, denial of medication, and grievance review results);

3. Living conditions (inmate safety (padlocked cells and physical violence), and the special meal program and punishment for alleged rule violations);

4. Access to legal materials, court, and counsel (writing materials, attorney visitation, telephone system (recording of privileged calls, time restraints on calls, collect calls)); and,

5. Privileges (telephone (collect calls) and visitation (insufficient staff)).

[Id. at 17].[2] Plaintiffs averred that they are entitled to an evidentiary hearing on those issues that they do not concede to be in compliance with constitutional minimum standards, and that the burden of proving that there are no ongoing constitutional violations is on Defendants under Gilmore, supra. [Id.].

Defendants responded to Plaintiffs' 2002 Report. [Doc. # 857]. Defendants first argued that Plaintiffs should not be granted access to inmate grievances because of confidentiality concerns, and because "[r]eview [of] these approximate[ly] 35,000 grievances is also not likely to provide relevant and useful information." [Id. at 3]. Defendants averred that the grievances are not proof of mistreatment, and are instead evidence that inmates are afforded due process. [Id.]. Defendants also claimed that production of the grievances would be overly burdensome. [Id. at 4]. As to transcripts of recorded telephone calls, Defendants argued that principles of comity should prevent Plaintiffs from pursuing claims collateral to those already being litigated in Superior Court. [Id. at 4]. Defendants agreed to allow Plaintiffs access to the Madison Street Jail to inspect padlocked cells.

Defendants then proceeded to address the five areas of concern contained in Plaintiffs' Report, claiming that no evidentiary hearing is necessary as to any issue. Defendants did not address, however, plumbing or outdoor exercise issues in their response to the 2002 Report.

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[2] These categories would later become known as the "five issue areas."

Plaintiffs filed a Reply reiterating the issues for which a hearing is necessary. [Doc. # 867]. However, although Plaintiffs refer generically to "living conditions," the Reply does not state that plumbing issues or access to outdoor recreation were among the specific issues to be addressed at any hearing.

On March 4, 2003, the Court set a hearing on the Motion to Terminate. [Doc. # 872]. In that Order, the Court ordered the parties to be prepared to discuss at oral argument what issues may require an evidentiary hearing. [Id. at 2]. The Court conducted the hearing on April 14, 2003, and took both the Motion to Terminate, as well as discovery issues, under advisement. [Doc. # 876].[3] The Court also stated that it was considering appointment a special master. [Id.].

C. The 2003 Proceedings Regarding Appointment of a Special Master and Preparation for an Evidentiary Hearing

Two months after the Court mentioned that it was considering appointment of a special master, Plaintiffs filed a motion for appointment of special master. [Doc. # 878].[4] In their response to the motion, Defendants outlined their informal efforts to accommodate the appointment of a special master prior to the filing of Plaintiffs' motion for appointment. [Doc. # 881]. Defendants attached the April 25, 2003 letter from Plaintiffs' counsel, in which Plaintiffs' counsel states that the subjects Plaintiffs wished to pursue at an evidentiary hearing were those raised in Plaintiffs' Reply to the Joint Response of Defendants to Plaintiffs' Report (Doc. # 867). [Doc. # 881, Exh. B]. Defendants attached another letter dated May 20, 2003, in which Plaintiffs outline 5 issues for hearing: (1) jail population and housing conditions; (2) medical services including psychiatric and psychological services; (3) padlocked cells and the disciplinary process (procedure and punishment, including special meals); (4) access to legal materials (including writing materials); access to counsel (including

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[3] No transcript for this hearing is in the Court's file.

[4] The motion is not contained in the file.

visitation and telephone calls); and, (5) telephone and visitation privileges. [Id., Exh. E].[5] Plaintiffs filed a Reply, which did not dispute Defendants' conclusion. [Doc. # 882].

On September 2, 2003, the Court held a hearing regarding appointment of a special master. [Doc. # 888]. The Court decided not to appoint a special master, and instead indicated that he would hold a two-day evidentiary hearing. [Id. at 4]. Addressing the five issue areas, the District Judge stated that he was not "prepared to say at the minute" "whether all of those might involve constitutional violations." [Id.]. The Judge then opined that each side should submit a memorandum prior to the hearing about these five issues and "what they perceive the factual situation to be with respect to those circumstances." [Id. at 5].

The Judge noted at the hearing that he was not going to "get into" reviewing inmate grievances. [Id. at 6]. The Judge further stated that Plaintiffs should be able to obtain information from Defendants regarding the number of prisoners, the number of jail cells, and other information about jail population numbers including whether inmates had access to day rooms and "whether there's some requirement for times out of cells, exercise, things like that." [Id. at 5, 8]. The Judge refused to get into a discussion about the exact details of what Defendants should present at the evidentiary hearing, stating to defense counsel that "I don't want to have another six months identifying what we're doing, Mr. Birnbaum. You've been in this case how long?" [Id. at 14]. However, the Court did specify, for example, that the Defendants should be prepared to present what their policies and procedures are pertaining to, for example, the provision of health care. [Id. at 15]. When counsel for Plaintiffs raised the issue of being able to test what Defendants say at the hearing, the Court stated that "[w]ell, we'll start out and see what they tell us, and then if

[5] These five issue areas are almost identical to those contained in Defendants' response to the motion for special master.

there's some problem about testing them, then we can do that." [Id. at 17].

On September 25, 2003, the Court formally granted Plaintiff's Motion for Evidentiary Hearing (Doc. # 852). [Doc. # 889]. In his Order, the District Judge ordered that "any notices, with respect to issues to be addressed at the Evidentiary Hearing, be filed by [dates]." [Id.]. The Court then set the evidentiary hearing for dates in November 2003.

D. The Pre-Hearing Memoranda

As ordered, both Defendants and Plaintiffs filed pre-hearing memoranda. In their Memorandum ("Defendants' 2003 Pre-Hearing Memorandum"), Defendants referred to outdoor exercise and plumbing issues, but only as they pertained to overcrowding. [Doc. # 906 at 17]. In their Memorandum ("Plaintiffs 2003 Pre-Hearing Memorandum"), filed 7 days after Defendants Memorandum was filed, Plaintiffs outlined the topics for which they seek a hearing:

1. Housing conditions
   a. overcrowding
   b. inadequate supervision
   c. inmate suicides
   d. prisoner-on-prisoner violence
   e. lockdowns and restricted diets
   f. lack of basic sanitation
   g. lack of physical exercise
   h. security overrides due to lack in staffing
   i. incorrect classification of inmates
   j. prisoners sleeping on the bare floor in intake areas
   k. padlocked cells

2. Medical, Dental and Psychiatric Care
   a. lack of staffing
   b. failure to receive prescribed medication
   c. tooth extraction as a substitute for proper dental care
   d. inadequate medical screening at intake and inadequate notification of access to health care
   e. use of mechanical restraints and segregation for mentally ill patients, including segregating patients naked on bare cement floors
   f. inadequate identification and care of suicidal inmates
   g. failure to keep adequate medical records
   h. prescribing psychiatric medicines for prolonged periods of time without follow-up
   i. failure to procure an inmate's prior mental health history
   j. inadequate control of contagious diseases

3. Access to legal services
   a. failure to provide writing materials to indigent inmates
   b. failure to provide access to counsel because of inadequate staffing
   c. requiring inmates to call counsel collect
   d. monitoring and taping of confidential phone calls
   e. opening of legal mail
   f. failure to provide access to a telephone during business hours
   g. failure to provide contact visits with counsel

[Doc. # 920].

E. The November 2003 and January 2004 Evidentiary Hearings

The District Judge began hearings on the Motion to Terminate on November 25, 2003. [Doc. # 924].[6] At the hearing, the Judge addressed briefly the standard for terminating a consent decree pursuant to 18 U.S.C. § 3636(b), including which party bears the initial burden of proof under the statute. [Id. at 10-16]. The Court then proceeded to allow Defendants to present witness testimony regarding current conditions for pretrial detainees in the Maricopa County jail system.

Defendants first presented the testimony on Dr. Gale Steinhauser ("Steinhauser") regarding medical and mental health care in the jail system. [Id. at 21-88]. Steinhauser testified that the 8 physicians and 8 mid-level providers (physician's assistants and nurse practitioners) provide all necessary and adequate care for inmates. [Id. at 37]. As to psychiatric staff, Steinhauser stated that 7.3 psychiatrists are working on the "front line," but that two openings remained. [Id. at 38]. Steinhauser also testified that two psychologist positions are funded, but that at that time, one position remained to be filled. [Id. at 39]. Steinhauser concluded that when these two positions are filled, staff and funding is adequate to provide medically necessary psychiatric care, prescribe medications, and to monitor and follow up on care. [Id. at 39]. Steinhauser further concluded that the staff of 60 RNs and 32 LPNs is an adequate number of staff. [Id. at 44]. Lastly, Steinhauser

[6] The Court summarizes only those portions of witness' testimony that the Court deems relevant to the motions at hand.

averred that 40 medical assistants, 10 or 12 patient care assistants, and 20 counselors are currently funded. [Id. at 44].

The testimony of Bill Williams ("Williams"), Deputy Chief of Custody for the Maricopa County Sheriff's Office, followed. [Id. at 89-172]. Williams testified as to the current make-up of jail facilities within the system, including each facility's capacity, the average length of stay of pretrial detainees, details as to how pretrial detainees are booked into the Madison Street Jail ,and housing arrangements at the Towers, Estrella and Durango jails. Williams then discussed future plans to open new facilities, including a new intake area at the new 4th Avenue Jail in July of 2004, and the closing of the intake area of the Madison Street Jail. Williams further testified that in the second phase of realignment of pretrial detainees, detainees would be moved from the Durango Jail to the newly constructed Lower Buckeye Jail. As for plans to accommodate further, future increases in pretrial detainees, Williams averred that Maricopa County plans to renovate portions of the Madison Street Jail, and to construct an entirely new facility in place of the current Durango Jail. Williams testified that the current "Master Plan" would provide for enough facilities to last through the year 2012.

In response to the Court's concern that any opinion regarding facilities to be constructed in the future would be advisory, counsel for Defendants countered that he was merely trying to demonstrate that even if there is a problem, the solution has been "funded, constructed, and is coming on line." [Id. at 124]. Williams then testified as to several other aspects of jail operations, including: padlocks and lock-down procedures, whether the medical needs of inmates are being met, the "nutriloaf" special meal program for addressing disciplinary matters, mail privileges, laundry and inmate hygiene, accommodation of special dietary needs, access to library services (including legal materials and supplies), grievance procedures, how inmate violence is addressed, exercise, visitation, and telephone privileges (including legal calls).

Upon completion of the testimony by Steinhauser and Williams, counsel for Plaintiffs sought a 60-day continuance to cross-examine the witnesses due to, among other obstacles, reviewing large amounts of discovery. [Id. at 173]. Counsel for Defendants then requested that the Court require Plaintiffs to provide the Court a pre-hearing summary prior to presenting their case. [Id. at 181]. Counsel for Plaintiffs suggested to the Court that the assistance of experts was in order to help prepare Plaintiffs' case. [Id.]. In response to Plaintiffs' request, the Court stated that Plaintiffs could file a motion regarding experts, but that the motion should explain as to what the experts would testify to. [Id. at 182]. Plaintiffs filed a motion for appointment of experts on December 12, 2003. [Doc. # 930].

Cross-examination of Steinhauser and Williams occurred on January 22, 2004. [Doc. # 941]. Steinhauser testified that the jail was on probation at the time the jail received accreditation by the National Commission on Correctional Health Care ("NCCHC") in 2000, and that the report indicating that some of the essential NCCHC standards were not being met has not been submitted to either the Court or Plaintiffs. [Id. at 11]. Steinhauser further stated that although the jail was "still having trouble meeting [the] 14 day physical" requirement under the NCCHC standards, initial screening still takes place to identify problems if they exist. [Id. at 13-15].

In an effort to determine how many doctors are necessary to meet the mental health care demands of pretrial detainees, Plaintiffs' counsel pressed Steinhauser to arrive at a percentage of inmates with "major psychiatric disorders." Steinhauser, however, was unable to provide counsel an exact figure. [Id. at 16-34]. Plaintiffs' counsel then explored with Steinhauser documented occurrences of violations of state regulations regarding mental health care in individual cases. [Id. at 36-37]. Steinhauser acknowledged that incidents do occur, but that action plans are usually put into place to make sure that appropriate personnel are educated so that a similar incident does not reoccur. [Id. at 37]. Steinhauser further testified that the timing of

medication and the staffing pattern to administer medication prior to court appearances has been changed so that inmates no longer miss their medications on those days. [Id. at 39]. On redirect, Steinhauser confirmed that although the jail has been placed on probation by the NCCHC in the past, as part of the accreditation process, the NCCHC reviewed the corrective and remedial actions taken by the jail. [Id. at 54].

Plaintiffs also addressed how a co-pay system for health care may impede access. [Id. at 49]. In response, Steinhauser stated that she is not aware of any detainee being denied health care because of indigency. [Id. at 50]. Plaintiffs concluded by inquiring on to the use of restraint chairs. [Id. at 53-54]. Defendants conducted limited redirect. [Id. at 54-56].

Plaintiffs first cross-examined Williams as to the policy of padlocking cells. [Id. at 56-65]. Plaintiffs then addressed issues related to overcrowding at the Durango Jail (id. at 65-74; 93-94), as well as how detainees are housed at intake (id. at 74-79). Plaintiffs briefly asked questions related to meals and roach infestations (id. at 79-81), and then turned to the issues of the average stay of pretrial detainees (id. at 81-85; 91-93) and the number of grievances filed, by category, between 2000 and 2002 (id. at 87-91). Williams was cross-examined as to the special meal program in relation to due process and weight loss (id. at 95-100) and the provision of legal materials (pencil and writing material) (id. at 100-102). Plaintiffs concluded their cross-examination of Williams on the subject of restraint chairs. [Id. at 102-104].

F. Proceedings Addressing the Currently Pending Motions

Most of the currently pending motions were filed after the January 22, 2004 hearing. At a status hearing held on August 16, 2004, the Court questioned Defendants as to the progress of opening the new facilities testified to by Williams. [Doc. # 1014]. The Court further suggested to Plaintiffs that the Court was inclined to terminate the Amended Judgment without prejudice to filing a new class action, given that new jail facilities were beginning to come on line. [Id. at 9-10]. The Court

then discussed the matter of discovery and expert witnesses with Plaintiffs, and took the pending motions under advisement.

On January 26, 2005, the assigned District Judge ordered that this case be referred to the undersigned for determination of pending procedural, discovery and other pretrial matters, as well as the preparation of a report and recommendation regarding the ultimate disposition of the issues presented by Defendants' Motion to Terminate. [Doc. # 1063].

II. Plaintiffs' "Motion for Partial Judgment" (Doc. # 946)

Defendants' "Motion to Compel Compliance With the Court's 1/21/04 Order and to Require Specification of All Alleged Current and Ongoing Constitutional Violations" (Doc. # 950)

Plaintiff's "Motion to Exclude Supplemental Evidence" (Doc. # 969)

A. Plaintiff's Motion for Partial Judgment

1. Plaintiffs' Contention that Recreation and Plumbing Issues Were Not Addressed by Defendants at All at the Evidentiary Hearing

In their Motion for Partial Judgment (Doc. # 946), Plaintiffs contend that Defendants, in their case-in-chief, failed to address entirely that they comply with the Constitution as to the following paragraphs of the Amended Judgment: ¶ 45 (prompt removal of pretrial detainees from cells with inoperable toilets and sinks to a place where such facilities are available); ¶ 47 (maintenance of a written plan for daily housekeeping and regular maintenance of the jail, including toilets, shower and sinks in good repair and cleaned properly); and, ¶¶ 84-86 (recreation time outside). Plaintiffs, therefore, conclude that they are entitled to partial judgment on these issues.

In their Response (Doc. # 952), Defendants aver that their presentation at the November 2003 hearing addressed only those potential constitutional violations identified by counsel for Plaintiffs' class prior to the hearing (population/housing, medical services, padlocked cells, special meals, violence against inmates, access to legal materials, access to counsel through visits and telephone calls, and general

telephone and visitation issues). Therefore, Defendants argue, they did not address each and every section of the Amended Judgment. Defendants point out that April and May 2003 letters authored by Plaintiffs counsel, which were later incorporated into Defendants' proposed Order of Reference lodged August 1, 2003 (Doc. # 881), framed the issues that Plaintiffs wanted addressed at the evidentiary hearing. [Id. at 4].[7] Defendants note that although Plaintiffs "criticized some sections of that proposed Order of Reference, the plaintiff-class had no objections to section 9 (which set forth the issues as formulated by counsel for the plaintiff-class)." [Id. at 5]. Defendants further note that the Court, at the September 2, 2003 hearing on the issue of appointing a special master (Doc. # 885), "made express reference to this list of issues. . . ." [Id.]. Defendants argue that Mr. Jarvi again referred to this category of hearing subjects in a September 16, 2003 letter[8] requesting information in preparation for the upcoming evidentiary hearing. [Id.].

Defendants argue that the requirements in the Amended Judgment far exceed what the Constitution requires, and cannot be used by Plaintiffs to show the existence or non-existence of any current or ongoing constitutional violations at the Maricopa County jails. [Id.]. Defendants argue, as they did before the District Judge at the November 2003 hearing,[9] that the Amended Judgment is stayed and that "the proper focus of a motion to terminate pursuant to the PLRA is upon whether there are current and ongoing constitutional violations and, if so, what, if any prospective relief remains necessary to correct the identified violation and satisfies the three-fold statutory requirement that such relief 'extends no further than necessary to correct

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[7] The letters can be found at Doc. # 881, Exhibits B and E.

[8] Doc. # 902 at Exh. A.

[9] Doc. # 924 at 11. The assigned district judge advised defense counsel not to push the argument as to whether the Amended Judgment was automatically stayed by the PLRA.

the violation,' is 'narrowly drawn,' and is 'the least intrusive means to correct the violation." [Id. at 5-6]. Defendants conclude by noting that if the Court finds that these issues should be addressed, the Court should reopen proceedings so that Defendants can demonstrate that no systemic problems exist that amount to a constitutional violation. [Id. at 17].

In their Reply, Plaintiffs aver that they indeed informed Defendants of their intent to raise the issue of plumbing and recreation in the November 21, 2003 Memorandum (Doc. # 920) filed in compliance with the Court's November 14, 2003 Order (Doc. # 905). [Doc. # 957]. Plaintiffs further aver that Rule 52(c) does not allow Defendants to reopen their case to address shortcomings in their case-in-chief. [Id. at 4].

2. Plaintiffs' Argument that Defendants' Evidence Presented At the Evidentiary Hearing Affirmatively Establishes Constitutional Violations Exist

Plaintiffs also argue in their Motion for Partial Judgment that Defendants' evidence presented at the evidentiary hearing affirmatively establishes constitutional violations as to the following provisions of the Amended Judgment: ¶ 9.D. (no housing of inmates in day rooms or other temporary facility); ¶ 9.F. (double bunking only if two permanent bunks exist with access to a dayroom with no beds); ¶ 42 (sufficient bedding for reasonable sleeping comfort); ¶ 56 (proper screening at reception); ¶ 57 (access to health care services that conform to NCCHC standards)[10]; and, ¶ 72.C. (provision of a blanket and bed or mattress for detainees incarcerated in the intake area over 24 hours). [Doc. # 946]. Plaintiffs argue that under Gilmore, supra, Defendants carry the initial burden of proof in termination proceedings, including proving that they comply with the U.S. Constitution in areas covered by the Amended Judgment. [Id. at 4].

[10] Plaintiffs attach relevant portions of the NCCHC's "Standards for Health Services in Jails" as an exhibit to their Motion for Partial Pretrial Judgment.

As to mental health care staffing (¶ 57 of the Amended Judgment), Plaintiffs point out that Dr. Steinhauser testified at the evidentiary hearing that the jail was short-staffed, with two positions waiting to be filled. [Id. at 7].[11] Plaintiffs also aver that Dr. Steinhauser admitted that initial health assessments (¶ 57 of the Amended Judgment) are not conducted within 14 days, per the NCCHC "essential" standard and contrary to the Ninth Circuit's holding in Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1189-90 (9th Cir. 2002). [Id. at 8]. As to sleeping conditions (¶¶ 9.D., 9.F., 42, and 72.C of the Amended Judgment), Plaintiffs focus on Defendants' testimony that pretrial detainees are required to sleep on pallets on the floor, sometimes in day rooms. [Id. at 9]. Plaintiffs point out that the Amended Judgment requires that pretrial detainees may not be housed in a day room or other temporary housing of any kind, and that detainees must be provided a mattress and bed or bunk under the Ninth Circuit's holding in Thompson v. City of Los Angeles, 885 F.2d 1439, 1448 (9th Cir. 1989). [Id.].

Defendants counter in their Response that Plaintiffs are incorrect that NCCHC standards are equivalent to constitutional requirements for health care. Instead, Defendants contend, evidence presented at the hearing demonstrates that no deliberate indifference to medical and mental health care needs has occurred as to pretrial detainees. As to the standard for deliberate indifference applicable to Plaintiffs' class, Defendants aver that the "Court's focus must be on the facility's medical program" and whether it "provides reasonable access to medical care–that is, whether the jail has systemic deficiencies in staffing, facilities, or procedures that make unnecessary suffering inevitable, or whether prison officials intentionally deny a prisoner access to medical care or interfere with prescribed treatments." [Id. at 9-10].

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[11] Plaintiffs cite three cases for the premise that the U.S. Constitution requires a minimum number of jail psychiatric staff.

Defendants claim that the decision in Ruiz v. Johnson, 154 F. Supp. 2d 975, 987-998 (S.D. Tex. 2001) is instructive as to what constitutes a current and ongoing constitutional violation in the provision of health care under termination proceedings under the PLRA. [Id. at 10]. Defendants provide excerpts from that case detailing what, in the opinion of that district court, were "deeply disturb[ing]" but yet "insufficient to show that the defendants were deliberately indifferent to prisoners' physical and mental health needs, as required to prove a violation of the Eighth Amendment." [Id. (citation omitted)]. Defendants aver that if that court did not find a constitutional violation, "the matters raised in Plaintiffs' Motion regarding psychiatrist staffing and the provision of complete physicals to apparently healthy inmates are trivial." [Id. at 11]. Defendants further aver that mental health staffing levels exceed constitutional standards, and that Plaintiff's motion for partial judgment ignores the fact that although vacancies occurred from time to time, Correctional Health Services ("CHS") had "7.3 funded, front-line, licensed psychiatrists positions (not including the Chief of Psychiatry). [Id.]. As to intake screening, Defendants reiterate the Dr. Steinhauser's testimony stating that just because medical screening is not conducted within 14-days (as per policy), care is not necessarily inadequate because initial screening separates the apparently healthy from those with problems that require a more immediate, thorough screening. [Id. at 14].

Defendants further counter that the sleeping conditions at the jail also do not rise to the level of unconstitutionality, as inmates still in a holding cell after 24 hours (which constitutes .1% of all inmates in intake) are moved to a cell containing a bed. [Id. at 15]. Defendants note that the use of dayrooms and stackable, portable beds are evidence of Defendants' efforts to deal, in their discretion, with a high jail population in a constitutional manner. [Id. at 15-16]. Defendants note that a district court in Delaware has found that sleeping on mattresses on the floor for less than two weeks did not rise to a constitutional violation as long as the detainees are

provided adequate food, shelter and clothing, and that an Illinois district court has held the same way regarding mattresses on the floor. [Id. at 16 (citations omitted)].

In their Reply, Plaintiffs reiterate their argument that Defendants' witness' own testimony confirms that mental health care staffing is inadequate. [Id. at 6]. Plaintiffs also reiterate that Defendants cannot rely on NCCHC accreditation to satisfy their burden of proof. [Id. at 7]. Plaintiffs contend that intake screening must be conducted by a qualified medical staff member within a reasonable time, and that Dr. Steinhauser's admission that there is a longstanding failure to conduct screening within the 14-days period establishes deliberate indifference. [Id. at 8-9].

Plaintiffs also argue in their Reply that Defendants admit that some pretrial detainees are kept in the intake cells for over 24 hours, and that some prisoners are required to sleep on the floor. [Id. at 9]. Further, Plaintiffs contend that Ninth Circuit precedent has "condemned the practice of requiring prisoners to sleep on floor mattresses." [Id. at 9-10].

B. Plaintiffs' Motion to Exclude Supplemental Evidence

In their motion, Plaintiffs request that the Court strike the supplemental evidence submitted by Defendants on May 20, 2004 (Doc. # 964). [Doc. # 969].

In their May 20, 2004 submission, Defendants state that they are submitting additional evidence on those issues not addressed in their evidentiary presentation at the November 23, 2003 hearing, and which are the subject of Plaintiffs' Motion for Partial Judgment. [Doc. # 964 at 1-2]. Defendants concurrently submit the affidavits of Dr. Steinhauser and Bill Williams. [Doc. # 965, 966]. Dr. Steinhauser states in her affidavit that the problems with sinks, toilets and showers are transitory in nature, and are corrected in a way that does not create any serious risk to the health and safety of inmates. [Doc. # 965 at 2]. Dr. Steinhauser further affies that those inmates who are not subject to special confinement or procedures receive one hour of exercise three times per week. [Id. at 2-3]. Williams' affidavit and exhibits provide,

in detail, statistics regarding the repair of plumbing problems, the provision of outdoor exercise, and grievances filed thereon. [Doc. # 966].

Plaintiffs argue in their motion to strike that Defendants' submission is unauthorized and improper, and that the Court should grant Plaintiffs' motion for partial judgment. [Doc. # 969]. Plaintiffs aver that the proper way to submit the evidence would have been through a motion to reopen, but that in the end, "such a motion would have to be denied." [Id. at 4]. In the end, Plaintiffs argue, even if the Court were to consider such information, Defendants fail to carry their burden that they comply with the Constitution. [Id. at 6].

In their response to the motion to strike, Defendants reiterate the same argument that neither the subject of toilets/sinks/showers, nor the provision of outdoor exercise, were part of the "five questions" that were explicitly and impliedly agreed upon throughout 2003 and prior to the November 23, 2003 evidentiary hearing. [Doc. # 978]. Defendants state that the Court should deny the motion to strike, and if necessary, allow Dr. Steinhauser and Williams to present testimony, as well as cross-examination. [Id. at n.5].

Plaintiffs counter in their reply that Defendants fail in their response to explain why they never sought to reopen the evidentiary hearing, and why it is proper to reopen a case after a Rule 52(c) motion has been filed. [Doc. # 982]. Plaintiffs reiterate that their November 21, 2003 Memorandum (Doc. # 920) specifically alleged that plumbing at the jail was broken and malfunctioning, and that detainees were not receiving necessary physical exercise. [Doc. # 982 at 3]. Plaintiffs aver that if Defendants were somehow surprised by the this allegation, and needed more time to prepare so that the issues could be presented at the evidentiary hearing, Defendants should have moved for a continuance. [Id.]. Plaintiffs further state that as early as May 2003, Plaintiff's counsel's letter informed Defendants that housing conditions would be the subject of upcoming hearings. [Id. at 4]. Plaintiffs aver that in addition to the May 2003 letter, Plaintiffs' counsel's September 16, 2003 letter

requested specific information from Defendants regarding outdoor exercise. [Id.]. Plaintiffs also refer the Court to Defendants' pre-hearing memorandum filed November 14, 2003, in which Defendants describe the recreational facilities that will be available once the new jails come on line. [Id. at 5].

C. Defendants' Motion to Compel Compliance

On January 11, 2004, the Court issued an Order that took under advisement the issue of the appointment of experts for Plaintiffs. [Doc. # 938]. In that same Order, the Court ordered Plaintiffs to "file an outline of the specific concerns Plaintiffs claim are at issue regarding the conditions in, and conduct at, the jails in question, and how any condition or conduct rises to a constitutional violation." [Id. at 2]. The Court appears to have requested the outline in order to, at least in part, determine whether an expert should be appointed, and the extent to which the expert would conduct his or her investigation. The Court's Order issued after the evidentiary hearing in November 2003, but before Plaintiffs cross-examined Defendants' witnesses. It is this outline that Defendants challenge in their motion to compel compliance.

On February 12, 2004, Plaintiffs filed the court-ordered outline, with the caveat that the outline may be incomplete because "defendants have repeatedly failed to provide the periodic reports under the Amended Judgment, and have refused Plaintiffs' requests for information that could lead to discovery of constitutional violations." [Doc. # 944]. Plaintiffs aver in their outline that Defendants' "fall short of constitutional requirements in numerous respects." [Id.]. As in their Motion for Partial Pretrial Judgment, Plaintiffs contend that Defendants fail in many ways to meet the mental and other health care needs of pretrial detainees, including: adequate health care staffing levels; adequately or timely screen incoming prisoners for communicable disease or other health care needs and to provide an adequate system for prisoners to make their health care needs known; provide prescribed medication and treatments and supervision of inmates on medication; provide

special diets; transfer to other medical facilities for specialized care; provide adequate food (that is, feeding the nutriloaf to inmates for disciplinary violations); adequate dental care; track and provide proper care to inmates at risk of self-harm or suicide; place mentally ill patients in proper housing; certain use of restraint chairs and four-point restraints. [Id. at 4-8].

As to "environmental health and safety," Plaintiffs also outline several constitutional violations including: keeping detainees in holding cells for more than 24 hours without a bed, forcing detainees to sleep on the floor; and forcing detainees to sleep on plastic pallets in dayrooms for extended periods of time. [Id. at 8]. Plaintiffs aver that these problems, in combination with overcrowding and poor sanitation, pose "an unacceptable risk of injury or illness." [Id.].

Plaintiffs further state in their outline that toilets, sinks, showers and other plumbing are often non-functional, and that the remaining, operational units are not enough to service the large number of detainees. [Id. at 9]. Plaintiffs also contend that facilities are infested with vermin, and that overcrowding results in an unacceptable risk of death by fire (including as a result of padlocking cells). Plaintiffs state that sanitation is entirely inadequate, "with garbage littering the tiers, dayrooms, and other areas, creating a hazard to prisoner health and safety," and "showers and toilets encrusted with scum" and "blocked drains creating pools of standing water." [Id.]. Plaintiffs further aver that ventilation and air flow is inadequate, which creates exposure to noxious fumes due to poor sanitation. [Id. at 10]. Plaintiffs state that food is often spoiled or improperly prepared, which places inmates at risk of illness. [Id. at 10]. Lastly, Plaintiffs aver that "prisoners are denied adequate physical exercise," including in some instances complete deprivation of outdoor recreation during the duration of pretrial detention. [Id.].

Over two months later, on April 21, 2004, Defendants filed their Motion to Compel Compliance with the Court's January 21, 2004 Order. [Doc. # 950]. In their motion, Defendants request that the Court strike the February 11, 2004 outline.

Defendants further request that the Court require Plaintiffs to provide a "specification that is meaningful, detailed and factual for each alleged current and ongoing constitutional violation at the Maricopa County Jails." [Id. at 2]. As part of that specificity, Defendants request that: (1) each assertion of a constitutional violation set forth with particularity the evidentiary basis for such a claim; (2) all discovery in connection with the alleged constitutional violation be identified with particularity; (3) Plaintiffs demonstrate why discovery is actually necessary; (4) produce the expert report to Defendants; and, (5) allow the expert to be deposed. [Id.]. Defendants' requests are based on their interpretation of the Court's January 11, 2004 Order as requiring Plaintiffs to provide with specificity each alleged ongoing constitutional violation accompanied by an explanation as to what facts support a claim that the alleged violation is unconstitutional and systemic. [Id.].

As a result of Plaintiffs' failings, Defendants aver that the renewed motion filed over two years ago remains pending, the November 2003 evidentiary hearing remains unfinished, and, "neither the Court nor the Defendants have meaningful information as to what specific conditions, policies or procedures are presently being claimed by the plaintiff-class to constitute systemic, current and ongoing constitutional violations, much less what evidence, if any, the plaintiff-class might present regarding such alleged violations when the November 2003 hearing on the Renewed Motion to Terminate again resumes." [Id. at 3]. Defendants conclude that Plaintiff's outline is merely an attempt to have experts appointed so that they may conduct a "fishing expedition." [Id. at 4]. Defendants take issue with Plaintiffs' caveat that discovery has not been provided, and therefore Plaintiffs may not be able to provide a full account of all ongoing and current constitutional violations. Defendants counter that they have provided discovery. Defendants further aver that the shortcomings in the February 11, 2004 outline demonstrate that Plaintiffs "know of no systemic, current and ongoing constitutional violations at the Jails," and therefore the Motion to Terminate should be granted and the case dismissed. [Id. at 5].

In their Response to the motion to compel compliance, Plaintiffs first note that the Court did not authorize what is essentially a response to the February 11, 2004 outline, and that Defendants must have sought leave of Court to file such response. [Doc. # 967]. Plaintiffs aver that Defendants' motion is meritless, as Plaintiffs cannot provide more specific facts without discovery, and when they request discovery, Defendants contend that Plaintiffs are not entitled to specific discovery because the case involves systemic problems. [Id. at 7]. Plaintiffs aver that any issue regarding discovery is irrelevant to the February 11, 2004 outline, but that at any rate, Plaintiffs should be entitled to discovery because they must prepare for an evidentiary hearing. [Id. at 10]. Plaintiffs note that other district courts have allowed such pre-hearing discovery. [Id. at 10-11]. Defendants filed a Reply, in which they reiterate their arguments that Plaintiffs should be required to state with more specificity the claims that they seek to pursue, and that Plaintiffs do not require more discovery to do so. [Doc. # 976].

D. Analysis

1. Plaintiffs' Motion for Pretrial Judgment

"On a [Rule 52(c)] motion, the trial judge weighs the evidence, resolves conflicts and determines where the preponderance lies. The motion may be granted even if the plaintiff has made out a *prima facie* case, provided the court is convinced that the evidence preponderates against the Plaintiff." Johnson v. United States Postal Serv. and Nat'l Rural Letter Carriers Ass'n., 756 F.2d 1461, 1464 (9th Cir. 1985) (citations omitted). Put another way, "[a] judgment of partial findings may be invoked when: (1) the party pursuing the claim has not demonstrated the elements of the claim either in fact or in law; or (2) the evidence of the party pursuing the claim has established one of the opposing parties' defenses as a matter of fact or law." MOORE'S FEDERAL PRACTICE ¶ 52.50 (3d ed 2003). Under Rule 52(c), the Court "may decline to render any judgment until the close of all evidence." Fed. R. Civ. P. 52(c). The Court, therefore, has discretion under Rule 52(c) to deny Plaintiffs'

Motion for Partial Pretrial Judgment pending the presentation of Plaintiffs' evidence regarding those provisions of the Amended Judgment that Plaintiffs contend rise to the level of constitutional violations.

As to the law applicable to Plaintiffs' claims, the Eighth Amendment to the U.S. Constitution imposes a duty on Defendants to "provide human conditions confinement," including providing adequate food, clothing, shelter and medical care. . . " Farmer v. Brennan, 511 U.S. 825, 832 (1991). Eighth Amendment claims of inhumane prison conditions must meet both an objective and a subjective requirement. Allen v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994), cert. denied sub nom. Sakai v. Smith, 514 U.S. 1065 (1995). That is, when an inmate asserts that prison officials have failed to fulfill this duty under the Eighth Amendment, the inmate must show that the deprivation is objectively sufficiently serious and that officials were "deliberately indifferent" to these basic needs. Wilson v. Seiter, 501 U.S. 294, 303-304 (1991); Farmer, 511 U.S. at 832. Under the objective component, the prison official's acts or omissions must deprive an inmate of 'the minimal civilized measure of life's necessities.'" Allen, 48 F.3d at 1087 (citing Farmer, supra; Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Under the subjective component, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer, 511 U.S. at 832. A prison official may be entitled to qualified immunity, however, if: (1) the law governing the official's conduct was clearly established, and (2) under that law, a reasonable official would have believed his conduct to be lawful. Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1050 (9th Cir. 2002) (citing Saucier v. Katz, 533 U.S. 194, 205 (2001) for the premise that the deliberate indifference and qualified immunity tests are separate inquiries).

A supervisor may be found liable if either that person is directly involved in the violation, or "if supervisory officials implement a policy so deficient that the policy

itself is a repudiation of constitutional rights and is the moving force of a constitutional violation." Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc), cert. denied, 502 U.S. 1074 (1992). However, a "lack of funds" defense to deliberate indifference may be available to a supervisor unless it can be shown that the supervisor "knows of, but disregards an appropriate and sufficient alternative." La Marca v. Turner, 995 F2d 1526, 1541 (11th Cir. 1993). See also Wilson, 501 U.S at 311; Stone v. City & County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992) (holding generally that "federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights").

"At least two routes can lead to the conclusion that a municipality has inflicted a constitutional injury." Gibson, 290 F.3d at 1185. In the first instance, a plaintiff may show that the municipality has either directly violated a constitutional right or ordered its employees to do so. Id. In the context of municipal liability for acts of deliberate indifference, "a municipality may not be held liable . . . unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant to governmental 'custom even though such a custom has not received formal approval through the body's official decisionmaking channels.'" Redman, 942 F.2d at 1444 (citing Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-91 (1978)). See also City of Canton v. Harris, 489 U.S. 378, 388, 390 n. 10 (1989).

A plaintiff may also prevail against a municipality by demonstrating that through its *omissions*, "the county is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation." Gibson, 290 F.3d at 1186. Because a

municipality cannot be held liable on a theory of *respondeat superior*, however, "a plaintiff must show that the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the constitutional violation." Id. (citing City of Canton, supra). "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." Gibson, 290 F.3d at 1186 (citing Farmer, supra). That is, "when the need to remedy the omission 'is so obvious, and the inadequacy so likely to result in the violation of constitutional right, . . . the policy makers [of the county] can reasonably be said to have been deliberately indifferent to the need.'" Gibson, 290 F.3d at 1195 (citing City of Canton, supra). Fiscal constraints on a municipality may not serve as a defense if alternative or interim measures are available to reduce the risk of a constitutional violation. See generally Hale v. Tallapoosa County, 50 F.3d 1579, 1584 (11th Cir. 1995) (citing LaMarca, supra).

Pretrial detainees also possess a due process right to remain free from restrictions that amount to punishment. Redman, 942 F.2d at 1440-41. "Because pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment, however, [the Court applies] the same standards." Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). The standards applicable to the specific claims of deliberate indifference (housing, etc.) will be further elaborated infra.

a. Housing

As to the housing of inmates in day rooms or other temporary facilities, double bunking, and the provision of reasonable sleeping comfort (including the provisions of a mattress and/or bed and a blanket after 24 hours in initial custody), Defendants have recently opened the new intake areas of the 4th Avenue Jail, and the Lower Buckeye facility. Therefore, it is uncertain whether the alleged housing conditions still exist, even assuming such practices are unconstitutional. Further, Plaintiffs have

not cited a case that stands for the specific premise that those pretrial detainees detained in an intake area *under* 24 hours must be provided a bed under the U.S. Constitution. Defendants have countered that their evidence establishes that those pretrial detainees that remain in intake *over* 24 hours are provided a bed.

Therefore, in light of the uncertainties surrounding the operation of the new jails after Defendants' presentation at the evidentiary hearing, the Court cannot find as a matter or fact or law at this juncture that Defendants' housing policies amount to cruel and unusual punishment or violate pretrial detainees' due process rights.

Accordingly, the Court will recommend that Plaintiffs' Motion for Partial Pretrial Judgment as to ¶ ¶ 9.D., 9.F., 42, and 72.C be denied.

b. The Provision of Medical and Mental Health Care

Plaintiffs' Motion for Partial Pretrial Judgment challenges two areas of the provision of health and mental care at the jail. First, Plaintiffs aver that Dr. Steinhauser has admitted that the mental health care unit was understaffed by one psychiatrist, and that adequate care can be provided only when fully staffed. Second, Plaintiffs argue that Defendants are not providing timely, initial health care screening.

Under the burden of proof standard previously applied to proceedings in this case, Defendants must initially demonstrate that the policies Plaintiffs challenge do not manifest a "'deliberate indifference' to the medical needs of the inmates at the jail" in violation of the Eighth Amendment.[12] Estelle v. Gamble, 429 U.S. 97, 104 (1976). "Prison or jail officials 'show deliberate indifference to serious medical needs if prisoners are unable to make their medical needs known to the medical staff. To find deliberate indifference by the County, it must be shown that it "(1) had a policy

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[12] Although the instant case involves claims by pretrial detainees of deliberate indifference, and not convicted prisoners, the Court applies an analogous standard under the Fourteenth Amendment process clause. Bell v. Wolfish, 441 U.S. 520, 535 n. 16 (1979); Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996).

that posed a substantial risk of serious harm to [pretrial detainees]; and (2) knew that its policy posed this risk." Gibson v. County of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002) (citing Farmer v. Brennan, 511 at 837). "[The] duty to provide medical care encompasses detainees' psychiatric needs." Cabrales v. County of Los Angeles, 864 F.2d 1454, 1461 (9th Cir. 1988), vac'd, 490 U.S. 1987 (1989), opinion reinstated, 886 F.2d 235 (9th Cir. 1989), cert. denied, 494 U.S. 1091 (1990). "As a practical matter, 'deliberate indifference' can be evidenced by 'repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff' or it can be demonstrated by 'proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is denied access to adequate medical care." Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984). See also Feliciano v. Rullan, 378 F.3d 42 (1st Cir. 2004) (upholding the district court's conclusion that denial of medical and mental health services in Puerto Rican jails was "massive and systemic.").

i. Mental Health Care

The Court will recommend that the Motion for Partial Pretrial Judgment be denied as to Plaintiffs' mental health care averments (¶¶ 56-57 of the Amended Judgment). While it is true that Dr. Steinhauser admitted on cross-examination that adequate mental health care is provided if the unit is fully staffed and that at times a staff vacancy may occur, the Court is not convinced at this juncture that one, temporary staff vacancy, or the policies surrounding filling vacancies demonstrates systematic, unconstitutional deliberate indifference to the serious mental health needs of pretrial detainees. Accordingly, the Court will recommend that Plaintiffs' Motion for Partial Pretrial Judgment as to ¶ 56-57 be denied.

ii. Medical Care

The Court will recommend that the Motion for Partial Pretrial Judgment be denied as to Plaintiffs' medical care averments. Plaintiffs emphasize that the 1995 Amended Judgment requires compliance with NCCHC standards as to medical

screening (including a full physical within 14 days). However, the question before the Court, post-PLRA, is whether the jail is complying with U.S. Constitutional standards. The Court is not convinced that failure to adhere to NCCHC standards regarding initial screening equates in every case, without evidence that violation of the standard poses a substantial risk of serious harm, to a violation of the deliberate indifference test set forth in Farmer v. Brennan, supra. See also Hoptowit v. Ray, 682 F.2d 1237, 1256-57 (9th Cir. 1982) (stating, in the context of alleged Eighth Amendment violations, that "it is error to constitutionalize the standards of particular groups [e.g., the American Correctional Association]"); Women Prisoners of the D.C. Dept. of Corrections v. District of Columbia, 93 F.3d 910, 929 (D.C. Cir. 1996), cert. denied, 520 U.S. 1196 (1997) (noting that those practices the American Correctional Association may find unacceptable may still be constitutional under U.S. Supreme Court jurisprudence). Plaintiffs have not provided evidence, either in fact or in law, that NCCHC accreditation, even if NCCHC standards were the Constitutional norm, requires that all pretrial detainees are provided a full medical evaluation within a 14-day period when an initial, immediate screening procedure is used to identify those detainees that require an immediate, full evaluation. The initial screening process, albeit not a full evaluation, provides detainees a route to have their medical concerns heard and acted upon. No evidence is currently before the Court that this screening procedure has resulted in harm that equates to systematic deprivation of detainees' "minimal civilized measure of life's necessities." Wilson v. Seiter, 501 U.S. 294, 304 (1991). Accordingly, the Court will recommend that Plaintiffs' Motion for Partial Pretrial Judgment as to ¶ 56-57 be denied.

c. Plumbing and Outdoor Recreation

18 U.S.C. § 3626 provides that:

(b) Termination of Relief.

(1) Termination of prospective relief.

> (A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener–
>
> . . . .
>
> (iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26,1996], 2 years after such date of enactment.
>
> . . . .
>
> (2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
>
> (3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct the violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.
>
> . . . .

18 U.S.C. § 3626(b)(1)-(3). The Ninth Circuit has held that contested decrees (e.g., the Amended Judgment in this case) that predate the PLRA do not necessarily "flunk" the standard contained in section 1326(b)(3) because "[d]istrict courts were already bound to follow a nearly identical standard." Gilmore, 220 F.3d at 1006. However, a district court "cannot terminate prospective relief without determining whether the existing relief (in whole or in part) exceeds the constitutional minimum." Id. at 1007.

As an initial matter, it is uncertain at best whether the Court can enter partial judgment under Federal Rule of Civil Procedure 52(c) based on Defendants' alleged failure to address plumbing and outdoor recreation issues at the November 2003 evidentiary hearing. Although the Ninth Circuit has placed the burden of proof on the party moving for termination, id. at 1007, both section 1326(b)(3), and the Ninth Circuit's decision in Gilmore, make it clear that a district court "*must* inquire into current conditions at a prison before ruling on a motion to terminate." Id. at 1008 (emphasis added).

Further, upon remand from the Ninth Circuit Court of Appeals, the Court consistently made it clear to the parties that the scope of inquiry in this case is limited to whether "prospective relief remains necessary to correct the violation of [a] Federal right, extends no further than necessary to correct the violation of [a] Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. § 3626(b)(3). The Court has never indicated that Defendants would be required to address, at an evidentiary hearing, each and every provision of the Amended Judgment. Instead, on several occasions, the Court has ordered that the parties file memoranda indicating which issues are of *constitutional concern* that must be addressed through an evidentiary hearing.

Even if plumbing and outdoor exercise were a proper subject of an evidentiary hearing in this case, from a review of the procedural history of this case, the specific constitutional issues relating to "housing conditions"–outdoor exercise and plumbing–were never clearly raised by either party. In their November 2002 Report, Plaintiffs laid out, in detail, the issues for which they believed a hearing was necessary. [Doc. # 852]. Plaintiffs did not state in their Report that they sought a hearing on *all* the provisions of the Amended Judgment. In their November 2003 Pre-hearing Memorandum, Plaintiffs state in one sentence that there is a "[l]ack of basic sanitation. Vermin infestation, including in food service facilities. Broken/nonfunctioning plumbing. Sanitation and Safety are covered under paragraphs 43 through 50 of the amended order." [Doc. # 920 at 9]. Plaintiffs further aver, in one paragraph, that there is "[l]ack of necessary physical exercise; some prisoners receive no outdoor exercise based on lack of staff. Pargraph[s] 84-86 of the Amended Order provides for excise [sic]." [Id.].

The April and May 2003 letters from Plaintiffs' counsel regarding appointment of a special master refer generically to "housing conditions," but do not refer to outdoor recreation or plumbing problems specifically. None of the briefing regarding the appointment of a special master filed in mid-2003 refers to these two topics. At

the hearing addressing appointment of a special master, the assigned District Judge, in one sentence, briefly referred to access to outdoor exercise.

Although invited to specifically spell-out all issues to be addressed at the evidentiary hearing, both sides failed to clearly do so in their pre-hearing memoranda. Defendants cursorily refer to outdoor exercise and plumbing in their November 14, 2003 memorandum, merely concluding that other district courts have held that such conditions did not rise to a constitutional violation. Plaintiffs are equally guilty of cursory treatment in their pre-hearing briefs of what has now become the subject of multiple pages of post-hearing briefing. Plaintiffs state in two short paragraphs in their pre-hearing memorandum that they believe outdoor recreation and plumbing to be issues that Defendants must address. It should be further noted that despite the assigned District Judge's admonishment that he would only address issues of constitutionality pursuant to the PLRA, and that not every issue contained in the Amended Judgment would or could be addressed under the PLRA's mandate, the only support Plaintiffs offer in their pre-hearing memorandum for their contention that these areas rise to a constitutional question is that the Amended Judgment requires outdoor exercise and functioning plumbing. If Plaintiffs felt that the issues of outdoor recreation and plumbing should have been addressed at the November 2003 and January 2004 hearings, Plaintiffs could have provided more detail so that both the Court and Defendants were apprized that Plaintiffs intended to assert these unconstitutionality of these conditions.

Accordingly, the Court will recommend that as to outdoor recreation and plumbing issues (¶¶ 47 and 84-86), Plaintiff's motion for partial judgment be denied. The Court will also recommend that Defendants' supplemental evidence regarding these issues to remain filed, and will recommend that Plaintiff's motion to exclude such evidence be denied. Plaintiff shall present the issues of outdoor exercise and plumbing at the evidentiary hearing for their case-in-chief.

2. Defendants' "Motion to Compel Compliance With the Court's 1/21/04 Order and to Require Specification of All Alleged Current and Ongoing Constitutional Violations" (Doc. # 950)

Plaintiffs' effort to specify issues for hearing appears to have begun by a letter dated May 20, 2003, in which Plaintiffs stated to Defendants that they seek an evidentiary hearing regarding:

1. jail population and housing conditions;
2. medical services including psychiatric and psychological services;
3. padlocked cells and the disciplinary process (procedure and punishment);
4. access to legal materials; and
5. access to counsel.

[Doc. # 881, Exh. E]. These areas of concern are now referred to by Defendants as the "five issue areas." Plaintiffs provided a more detailed explanation of these categories in their November 2003 Pre-hearing Memorandum. [Doc. # 920]. Unfortunately, this memorandum was filed four days prior to Defendants' evidentiary presentation. It appears, however, that Defendants did at least attempt to present evidence on all areas that were mentioned in Plaintiffs' November 2003 Pre-hearing Memorandum, except for outdoor recreation and plumbing issues. See supra, analysis.

Even though Plaintiffs had filed their November 2003 Pre-hearing Memorandum, on January 20, 2004, the assigned District Judge, addressing Plaintiffs' motion for experts, stated that "[t]he Court may deem it necessary at some juncture to appoint an expert witness or witnesses concerning specific conditions at Maricopa County jails. However, the issues are not sufficiently narrowed to permit an informed selection of any expert witness at this time." [Doc. # 938]. In that same Order, Court ordered that Plaintiffs file an "outline of the specific concerns Plaintiffs claim are at issue regarding the conditions in, and conduct at, the jails in question, and how any condition or conduct rises to a constitutional violation. . . ." [Id. at 2].

Plaintiffs filed their outline in February 2004. [See supra pages 20-21]. Like the November 2003 Pre-hearing Memorandum, the February 2004 outline contains a list of potential constitutional violations with citation to case law. However, the

February 2004 outline adds new claims of unconstitutionality and omits others that were contained in the November 2003 Pre-hearing memorandum. Further, the Court notes that the some of the issues contained in the February 2004 outline were not addressed by Plaintiffs on cross examination, or in the motion for partial pretrial judgment.

In addition to the problem with inconsistencies, although Plaintiffs' November 2003 Pre-hearing Memorandum and February 2004 outline state the basic areas of constitutional concern and contain case law citation, the documents fail to address how a certain number of these issues are germane to litigation centered on the *systemic* failures of the County to meet constitutional standards for pretrial detainees. That is, while many of Plaintiffs concerns could be litigated in the context of an individual § 1983 action, Plaintiffs do not explain how each of their concerns relates to a county policy of deliberate indifference or failure to meet due process requirements. For example, while Plaintiffs aver that Defendants fail to provide timely access to competent health care providers, Plaintiffs do not specify whether a policy exists governing the competency of providers and timing of health visits, and how the county and/or its administrators fail to implement that policy. A policy may systemically fail for a number of reasons (e.g., lack of staffing or budgetary constraints), but in the context of this litigation, the Court will not entertain allegations that relate more to isolated incidents better handled at the individual level. Plaintiffs' vague averments impermissibly force the Court to speculate, when evaluating the potential scope of expert and counsel access and discovery, how Plaintiffs intend to prove their allegations that constitutional violations are occurring on a system-wide basis. Further, certain areas of concern raised by Plaintiffs in their November 2003 Pre-hearing Memorandum and February 2004 outline are likely moot in light of the recent opening of new jails.

The Court, therefore, will grant Defendants' motion to compel compliance, and will deny without prejudice (in part) Plaintiffs' motions regarding the appointment of

experts, expert access, discovery, and access by class counsel to current detainees, and all other procedural motions associated with these motions. The Court will grant Plaintiffs' motion to compel discovery to the extent that all documents requested by Plaintiffs for which Defendants have claimed the "self-critical analysis privilege" shall be produced within 40 days of the filing of this Order.[13] The Court will further compel all inspection reports issued by *any* governmental agency as requested by Plaintiffs in request number 4 and relating to medical or mental health care, or environmental health and safety, for the years stated in the request. In addition, Defendants shall be required to respond to Plaintiffs' letter regarding missing responses to a request for production of documents relating to budget requests contained at exhibit 11 to document number 1002.

The Court will require a further and final submission by the Plaintiffs of an omnibus motion, within 60 days of the filing of this Order, that provides the following:

1. A numbered list of **each** specific area of current constitutional concern specifically addressed in the Amended Judgment. In asserting allegations of unconstitutionality, Plaintiffs must take into account the recent opening of new jails.
2. For **each** numbered area of constitutional concern:

   a. The basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing, including whether a county policy exists addressing the issue;

[13] The Ninth Circuit has recently held that this privilege does not exist under federal law. See Agster v. Maricopa County, 406 F.3d 1091 (9th Cir. 2005).

b. case law (without argument but including a summary of the holding) that addresses that specific claim in the context of a systemic failure (that is, citation to case law other than that in the individual context), or if none exists, case law generally applicable to the claim of systemic failure to meet constitutional requirements of detainees;

c. a detailed explanation of what further discovery, expert and counsel access, and expert appointment, if any, is relevant and why it is necessary to demonstrate the systemic failure on that particular claim;

d. Plaintiffs shall explain what documents have already been produced that relate to the particular issue (including the documents compelled by this Order after they have been received), and how further discovery and/or appointment of an expert or access to pretrial detainees for interviews is necessary to supplement Defendants' prior production.

e. If Plaintiffs seek detainees' custodial (including classification), medical or mental health records, Plaintiffs must explain the relevancy of the documents to the issue, detail a procedure for sampling and analysis of redacted records, and explain how such sampling and analysis will potentially support a claim of systemic failure to meet constitutional standards.

Defendants shall have 30 days to respond to Plaintiffs' omnibus motion.

III. Other Pending Motions

The Court will grant Plaintiffs' motion for a protective order and motion to quash subpoenas, to the extent that Defendants' proffered reason to depose Plaintiffs' experts, pre-tour, has been rendered moot by this Order requiring further specification by Plaintiffs of the issues presented for hearing.

The Court will grant Plaintiffs' motion related to the filing of declarations of class members to the extent that the existing filed declarations shall remained filed.

Plaintiffs aver that the filing of the declarations was necessary to supplement their motions for expert and counsel access, and discovery, all of which have been addressed by this Order.

The Court will deny as moot Defendants' motion for entry of a scheduling order, as the Court has, through this Order, addressed Defendants concern that the case proceed in a timely manner. Once Plaintiffs' omnibus motion is filed and Defendants respond, the Court intends to expeditiously rule on the motion as it relates to further discovery and access by Plaintiffs' experts and counsel. The Court further intends to set a date certain for Plaintiffs' evidentiary presentation once the Court rules on Plaintiffs' discovery and access motions. The parties are advised that they should be prepared to complete discovery and proceed with a hearing on Plaintiffs' case-in-chief diligently once ordered to do so. The court will not consider any motion for extension of time that would serve to further delay proceedings in this case.

IV. RECOMMENDATION; ORDERS

Based on the foregoing,

IT IS RECOMMENDED that Plaintiffs' "Motion for Partial Judgment" [Doc. # 946] be DENIED in its entirety.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. 28 U.S.C. §636(b)(1) and Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to

appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

IT IS ORDERED that:

1. The following motions are DENIED without prejudice to Plaintiffs' filing of the omnibus motion explained herein:
   a. Plaintiffs' "Order for Appointment of Experts" [Doc. # 930];
   b. Plaintiffs' "Motion Pursuant to Fed. R. Civ. P. 37(a)(2)(B) to Compel Defendants to Allow Expert Inspection" [Doc. # 958];
   c. Plaintiffs' "Motion Pursuant to Fed. R. Civ. P. 37(a)(2)(B) to Compel Defendants to Produce Relevant Documents" [Doc. # 989].
   d. Plaintiffs' "Motion for Order Requiring Defendants to Allow Class Counsel Access to Class Members" [Doc. # 1019]; and,
   e. Plaintiff's "Motion for Order Requiring Defendants to Allow Class Counsel Access to Class Members" [Doc. # 1093].
2. Plaintiffs' "Motion to Exclude 'Supplemental Evidence' Submitted by Defendants" [Doc. # 969] is DENIED. Defendants' supplemental evidence regarding recreation and plumbing issues shall remain filed. The Court will not reopen Defendants' presentation of their case-in-chief to further address these issues. Plaintiffs may present these issues in their presentation of their case-in-chief.
3. Plaintiffs' "Motion for Protective Order" [Doc. # 981-1] is GRANTED.
4. Plaintiffs' "Motion to Quash Deposition Subpoenas" [Doc. # 981-2] is GRANTED.
5. Defendants' "Motion to Enter Scheduling Order" [Doc. # 998] is DENIED as moot.
6. Plaintiffs' "Motion to Exceed Page Limit on Reply Brief" [Doc. # 1003] is GRANTED.

7. Plaintiffs' "Motion for Leave to File Declarations of Class Members and Former Class Members" [Doc. # 1026] is GRANTED to the extent contained herein.

8. Defendants' "Motion for Leave to File Supplemental Response to Address Certain Matters First Raised in Plaintiffs' Reply" [Doc. # 1027] is GRANTED. The Supplemental Response shall remain filed.

9. Defendants' "Motion to Compel Compliance with the Court's 1/21/04 Order and to Require Specification of All Alleged Current and Ongoing Constitutional Violations" [Doc. # 950] is GRANTED as explained herein.

10. Defendants shall produce, within 40 days of the filing of this Order, the following documents:

a. all documents requested by Plaintiffs through discovery for which Defendants have claimed the self-analysis privilege, including:

i. morbidity/mortality and root cause analysis reports relating to suicides for 2001 through 2003 with identifying information redacted.

ii. documents issued by the NCCHC to the County relating to the review and/or accreditation of jails by the NCCHC from January 1, 2000 to the present

iii. the independent evaluations of health care services required by paragraph 70 of the Amended Judgment from January 1, 2000 to present.

iv. all inspection reports issued by *any* governmental agency as contained in Plaintiffs' request number 4 and relating to medical or mental health care, or environmental health and safety, for the years stated in the request.

v. all minutes of any meetings of Correctional Health Services staff or contract health care providers from January 1, 2001 to present, subject to Defendants' filing of a motion for protective order.

b. Defendants shall submit formal discovery responses, including but not limited to objections, to Plaintiffs as to Plaintiffs' letter at exhibit 11 to Document number 1002 relating to Plaintiffs' requests for documents relating to budget requests for jail funding.

11. Plaintiffs shall have 60 days from the date of the filing of this Order to file an omnibus motion as instructed herein.

DATED this 30th day of September, 2005.

Morton Sitver
United States Magistrate Judge